No. 96931-1

SUPREME COURT OF THE STATE OF WASHINGTON

(United States District Court, Western District of Washington, Case No. C18-1173RSL (Consolidated with Case No. C18-1254RSL))

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON IN

KRISTA PEOPLES,
Appellee/Plaintiff,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
ET AL.,
Appellants/Defendants,

AND

JOEL STEDMAN, ET AL.
Appellees/Plaintiffs,

v.

PROGRESSIVE DIRECT INSURANCE COMPANY,
Appellant/Defendant.

BRIEF OF AMICUS CURIAE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION (APCIA) IN SUPPORT OF APPELLANTS UNITED SERVICES AUTOMOBILE ASSOCIATION, ET. AL. AND PROGRESSIVE DIRECT INSURANCE COMPANY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. IDENTITY AND INTERESTS OF AMICI CURIAE 1

II. QUESTIONS CERTIFIED 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 2

A. Each Cause of Action Carries With it Different Elements of Proof and Promises Different Types of Damages. The Answer to Certified Question No. 1 Must be "No" in Order to Preserve the Distinctions Between Each Cause of Action and the Damages Recoverable for Proving Each. 2

1. Breach of Contract: 3

2. Consumer Protection Act, RCW 19.86 *et. seq*. ("CPA"): 3

3. Insurer Bad Faith: 5

4. Insurance Fair Conduct Act ("IFCA"), RCW 48.30.015. 5

5. Appellees Are Not Deprived of a Remedy. 6

B. Certified Question No. 2 Includes, In Part, an Improper Request for Return of Earned Premiums. 8

V. CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Ambach v. French,
167 Wn.2d 167, 216 P.3d 405 (2009).....6, 7

Anderson v. State Farm Mut. Ins. Co.,
101 Wn. App. 323, 2 P.3d 1029 (2000).....5

Dayton v. Farmers Ins. Group,
124 Wn.2d 777, 876 P.2d 896 (1994).....3

Frias v. Asset Foreclosure Services, Inc.,
181 Wn.2d 412, 334 P.3d 529 (2014).....6, 7

In re Stranger Creek & Tributaries in Stevens Cty.,
77 Wn. 2d 649, 466 P.2d 508 (1970).....7

Indus. Indem. Co. of the Nw. v. Kallevig,
114 Wn. 2d 907, 792 P.2d 520 (1990).....4

Olympic Steamship Co. V. Centennial Ins. Co.,
117 Wn.2d 37, 811 P.2d 673 (1991).....3

Perez-Crisantos v. State Farm Fire & Casualty Co.,
187 Wn.2d 669, 389 P.3d 476 (2017).....6

Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha,
64 Wn.App 838, 827 P.2d 1024 (1992).....13

Schmidt v. Coogan,
181 Wn. 2d 661, 335 P.3d 424 (2014).....3

Smith v. Safeco Ins. Co.,
150 Wn. 2d 478, 78 P.3d 1274 (2003).....5

Stanton v. Public Employees Mut. Ins. Co.,
39 Wn. App. 904, 697 P.2d 259 (1985).....8

Tank v. State Farm Fire & Cas. Co.,
105 Wn. 2d 381, 715 P.2d 1133 (1986).....5

TABLE OF AUTHORITIES

Page(s)

Truck Ins. Exch. v. Vanport Homes, Inc.,
147 Wn.2d 751, 58 P.3d 276 (2002) 4

Woo v. Fireman's Fund Ins. Co.,
150 Wn. App. 158, 208 P.3d 557 (2009) 3

Federal Cases

Costco Wholesale Corp. v. Arrowood Indem. Co., No. C17-1212RSL, 2019 WL 1330455, at (W.D. Wash. Mar. 25, 2019) 4

Constitutional Provisions, Statutes and Court Rules

RCW 19.86 3

RCW 19.86.090 4

RCW 48.30.010 ..... 4, 5

RCW 48.30.015 ..... 4, 5

RCW 48.30.015(2) 6

RCW 48.30.015(3) 6

RCW 48.30.015(6) 6

WAC 284-30-300 ..... 4, 5

WAC 284-30-330 ..... 1, 2

Other Authorities

5 Couch on Insurance §79.7 (3d ed. 1996) 12

I. IDENTITY AND INTERESTS OF AMICI CURIAE

American Property Casualty Insurance Association ("APCIA") is the preeminent national trade association representing property and casualty insurers writing business in Washington, nationwide, and globally. APCIA was recently formed through a merger of two longstanding trade associations—Property Casualty Insurers Association of America (PCI) and American Insurance Association (AIA). APCIA's members, which range in size from small companies to the largest insurers with global operations, represent nearly 60% of the United States property and casualty marketplace. On issues of importance to that marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus-curiae briefs in significant cases before federal and state courts. This allows APCIA to share its broad national perspectives with the judiciary on matters that shape and develop the law. APCIA's interests are in the clear, consistent, and reasoned development of law that affects its members and the policyholders they insure.

II. QUESTIONS CERTIFIED

The certified questions are:

> 1. With regards to the injury to "business or property" element of a CPA claim, can insureds in Ms. Peoples' and/or Mr. Stedman's circumstances, who were physically injured in a motor vehicle collision and whose Personal Injury Protection ("PIP") benefits were terminated or limited in violation of WAC 284-30-330, bring a CPA claim against the insurer to recover out-of-pocket medical expenses and/or to compel payments to medical providers?

> 2. With regards to the "injury to business or property" element of a CPA claim, can insureds in Ms. Peoples' and/or Mr. Stedman's circumstances, who were physically injured in a motor vehicle collision and whose Personal Injury Protection ("PIP") benefits were terminated or limited in violation of WAC 284-30-330, bring a CPA claim against the insurer to recover excess premiums paid for the PIP coverage, the costs of investigating the unfair acts, and/or the time lost complying with the insurer's unauthorized demands?

(Order Consolidating Cases and Certifying Question to the Supreme Court, Dkt. #50)(hereinafter "Order").

III. STATEMENT OF THE CASE

APCIA relies on the facts as presented in Appellant United Services Automobile Association, et. al. ("USAA") and Appellant Progressive Direct Insurance Company's ("Progressive") Opening Briefs filed in this Court.

IV. ARGUMENT

A. Each Cause of Action Carries With it Different Elements of Proof and Promises Different Types of Damages. The Answer to Certified Question No. 1 Must be "No" in Order to Preserve the Distinctions Between Each Cause of Action and the Damages Recoverable for Proving Each.

The District Court suggests that "[i]t is relatively common for Washington drivers who believe their insurance company failed to make a good faith investigation of their claim or otherwise violated applicable insurance regulations to bring a CPA claim against the insurer." (Order at p. 3). It is equally common for insureds to bring claims in the same lawsuit against the insurer for breach of the insurance contract, bad faith, and for violation of the Insurance Fair Conduct Act ("IFCA")(RCW 48.30.015).

Each of these causes of action carries with it distinct elements of proof and, importantly for this appeal, different recoverable damages. As this Court recently acknowledged, "[e]ach of these causes of action offers unique remedies." *Schmidt v. Coogan*, 181 Wn. 2d 661, 677, 335 P.3d 424 (2014). This is precisely why, assuming there are sufficient supportive facts, insureds commonly assert all four, or a combination of, these causes of action in one lawsuit.

1. Breach of Contract:

"The general rule regarding damages for an insurer's breach of contract is that the insured must be put in as good a position as he or she would have been had the contract not been breached." *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 170–71, 208 P.3d 557, 563 (2009)(internal citations omitted). Generally, an insured who prevails on a breach of contract claim will not recover compensation for other harm that stems from an insurer's breach such as consequential economic harm like damage to a business that was not foreseen by the parties, or noneconomic damage. The insured *may* be entitled to attorney's fees; *Olympic Steamship Co. V. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991)(*en banc*); but there are exceptions; *see, e.g., Dayton v. Farmers Ins. Group*, 124 Wn.2d 777, 876 P.2d 896 (1994). There is no ability to recover enhanced damages for breach of contract.

2. Consumer Protection Act, RCW 19.86 *et. seq*. ("CPA"):

For an individual insured, i.e., a private plaintiff, to succeed on a CPA claim, that insured must prove (1) an unfair or deceptive act or

practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. The Washington Insurance Commissioner promulgated regulations defining specific acts and practices that constitute an "unfair or deceptive act or practice." RCW 48.30.010. Pursuant to the legislature's delegation, the Washington Insurance Commissioner adopted the Unfair Claims Settlement Practices Regulations. WAC 284-30-300 - 400. Violation of any of these regulations governing claims handling practices are *per se* unfair or deceptive acts or practices occurring in trade or commerce for purposes of the CPA. *Indus. Indem. Co. of the Nw. v. Kallevig*, 114 Wn. 2d 907, 920, 792 P.2d 520 (1990); *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 764, 58 P.3d 276 (2002).

However, a WAC violation establishes only the first two elements of a CPA claim. The complaining insured must still "establish that the particular violative conduct injured his or her business or property." *Costco Wholesale Corp. v. Arrowood Indem. Co*., No. C17-1212RSL, 2019 WL 1330455, at *8 (Judge Lasnik)(W.D. Wash. Mar. 25, 2019), reconsideration denied, No. C17-1212RSL, 2019 WL 1979289 (W.D. Wash. May 3, 2019).

A successful CPA claimant can recover actual damage to his or her business or property, injunctive relief, and attorney's fees and costs. RCW 19.86.090. There is also the ability to recover limited enhanced damages capped at three times the actual damages up to $25,000. *Id*.

3. Insurer Bad Faith:

To succeed on the tort claim of insurer bad faith, an insured must show that the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded. *See, e.g., Smith v. Safeco Ins. Co.*, 150 Wn. 2d 478, 78 P.3d 1274 (2003). The insured may also prove liability with evidence that the insurer violated one of the claims-handling regulations. *See, e.g., Tank v. State Farm Fire & Cas. Co.*, 105 Wn. 2d 381, 386, 715 P.2d 1133 (1986)("In addition, the Insurance Commissioner, pursuant to legislative authority under RCW 48.30.010, has promulgated regulations defining specific acts and practices which constitute a breach of an insurer's duty of good faith. *See* Washington Administrative Code 284–30–300 *et. seq*."). The bad faith theory permits an insured to recover some of the damages over those that are available in a pure breach of contract case or a CPA case. In a bad faith case, the insured my recover consequential and noneconomic damages. *See, e.g., Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 2 P.3d 1029 (2000)(Because bad faith is a tort, an insured is not limited to economic damages). Enhanced damages are not available for prevailing on a claim for bad faith.

4. Insurance Fair Conduct Act ("IFCA"), RCW 48.30.015.

Insureds often claim an insurer has violated the Insurance Fair Conduct Act ("IFCA"). IFCA is more comprehensive than the other causes of action – breach of contract, CPA violation and bad faith – in how an insured can prove liability and in the kinds of compensatory damages an insured can recover. RCW 48.30.010, RCW 48.30.015. A successful

insured is entitled to reasonable attorney's fees, RCW 48.30.015(3), and treble damages. While awarding treble damages under IFCA is discretionary, there is a higher ceiling on such an award than under the CPA. RCW 48.30.015(2).

Even though liability is more comprehensive, IFCA is not a comprehensive avenue for an insured's recovery of damages. *See Perez-Crisantos v. State Farm Fire & Casualty Co*., 187 Wn.2d 669, 389 P.3d 476 (2017)(No IFCA cause of action exists without "unreasonable denial of coverage or benefits."). Indeed, IFCA does not limit "any other remedy available at law." RCW 48.30.015(6). And, for example, the CPA authorizes injunctive relief but IFCA does not.

5. Appellees Are Not Deprived of a Remedy.

The CPA limits the successful insured's injury to "business or property." This is purposeful. These injuries do not materially overlap with injuries recoverable for breach of contract, bad faith or violation of IFCA. Of importance here, the CPA specifically excludes recovery for personal injuries, mental distress, embarrassment, and inconvenience. By the very nature of the damages identified in Certified Question No. 1 – "out-of-pocket medical expenses" and/or "payments to medical providers" – these are not damages recoverable under the CPA. Moreover, this Court has acknowledged that "[t]he financial consequences of such personal injuries are also excluded." *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014), citing, *Ambach v. French*, 167 Wn.2d 167, 178, 216 P.3d 405 (2009).

Insurers in Washington State rely on these principals and Appellees Peoples and Stedman have offered no principled basis for carving out an exception. The doctrine of *stare decisis* requires a clear showing that an established rule is incorrect and harmful before it is abandoned. *In re Stranger Creek & Tributaries in Stevens Cty*., 77 Wn. 2d 649, 653, 466 P.2d 508 (1970). Peoples and Stedman have not even tried to show why the rule announced in *Frias* and *Ambach* (that the financial consequences of personal injuries are not "injury to business or property") is incorrect and harmful. In fact, importing damages otherwise recoverable for breach of contract into the arena of the CPA is unnecessary and unwarranted.

Appellants have it absolutely right. "The restrictive nature of the CPA's "business or property" requirement demonstrates that the legislature intended claims arising from personal injury to be addressed by other causes of action. Requiring [an insured] to pursue those alternative claims, rather than a CPA lawsuit, would not deprive [an insured] of a viable remedy for any alleged wrongdoing, and would be consistent with this Court's decisions in *Ambach* and *Fisons*, [and *Frias*] as well as weight of other authorities rejecting CPA claims just like the one [the insured] asserts here." (Brief of Appellant USAA at p. 29).

APCIA suggests that the answer to Certified Question No. 1 must be "no".

B. Certified Question No. 2 Includes, In Part, an Improper Request for Return of Earned Premiums.

Certified Question No. 2 asks, in part, whether excess premiums paid for PIP coverage qualify as "injury to business or property" under the CPA. To the extent this Court finds the record in these cases sufficient to answer Certified Question No. 2, APCIA asserts that the answer must be "no", especially as to recovery of allegedly excess premiums paid for the PIP coverage.

It is a fundamental tenet of insurance law that an insured cannot retroactively recover earned insurance premiums paid after the risk has attached and the insurer becomes liable to pay valid claims. 5 Couch on Insurance §79.7 (3d ed. 1996):

> . . . an insured may not have any part of his or her premium returned once the risk attaches, even if it eventually turns out that the premium was in part unearned. This rule is based upon just and equitable principles, for the insurer has, by taking upon itself the peril, become entitled to the premium.

This is, in effect, the corollary to the general rule that the insurer, once it accepts and retains a premium covering the period when a covered accident happened, cannot deny that coverage existed. *Id*., s*ee*, for example, *Stanton v. Public Employees Mut. Ins. Co.*, 39 Wash. App. 904, 697 P.2d 259 (1985), *rev. denied*, 103 Wn.2d 1039 (1985) (auto liability insurer could not avoid paying underinsured motorist benefits by refunding amount of underinsured motorist premium, allegedly paid by mistake, long after insureds had commenced action to recover benefits under policy).

Here, Appellees Peoples and Stedman acknowledge that USAA and Progressive paid benefits to both of them in the form of reimbursement for medical expenses. Instead, the complaint here is that USAA and Progressive did not pay as much in medical expenses as Peoples and Stedman believe they were entitled in violation of the provisions of their PIP policies. Even if properly plead, the insured's remedy for a violation of the insurance policy is not a return of premiums, but an action for breach of contract, provided, of course that there actually was a contractual breach. *See*, *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 64 Wn.App 838, 827 P.2d 1024 (1992)(internal citations omitted)(Condition precedent to insurer claiming fraud or misrepresentation is tendering back the premium). By suggesting that "injury to business or property" damages under the CPA could include return of earned premiums would unnecessarily expand the compensable injuries under the CPA.

V. CONCLUSION

There is no principled basis to extend the reach of CPA "injury to business or property" to the financial consequences of personal injuries. As demonstrated, insureds such as Appellees Peoples and Stedman are not without a remedy when this Court answers "no" to both Certified Questions.

Respectfully submitted this 2nd day of August, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted: Double-click any box to check or uncheck.

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